SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAW MILL WORKERS UNION, LEWISTON, IDAHO, ET AL., PETITIONERS,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1945.

—5949

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23547

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, Lewiston, Idaho; Local 2679, Lumber and Sawmill Workers Union, Bovill, Idaho; Local 2664, Lumber and Sawmill Workers Union, Clearwater, Idaho; Local 2766, Lumber and Sawmill Workers Union, Potlatch, Idaho; Local 2684, Lumber and Sawmill Workers Union, Lewiston, Idaho; Local 2923, Lumber and Sawmill Workers Union, Coeur d'Alene, Idaho; and Harry Haines, Potlatch, Idaho, Individually and as President of Inland Empire District Council, Plaintiffs,

—vs.

HARRY A. MILLIS, Rochambeau Building, Washington, D. C., Individually and as Chairman and Member of The National Labor Relations Board, Gerald D. Reilly, Rochambeau Building, Washington, D. C., Individually and as Member of the National Labor Relations Board, and John M. Houston, Rochambeau Building, Washington, D. C., Individually and as Member of the National Labor Relations Board, Defendants

COMPLAINT FOR INTERLOCUTORY AND PERMANENT INJUNCTION, DECLARATORY JUDGMENT AND INCIDENTAL RELIEF—Filed March 21, 1944

Now come the above named plaintiffs, by Wettrick, Flood and O'Brien and George E. Flood, their attorneys, and for cause of action against the defendants allege that:

1. Inland Empire District Council, Lumber and Sawmill Workers Union, is a labor organization within the meaning and purview of an Act of Congress, entitled the "National Labor Relations Act", 49 Stat. 449, and is affiliated with the [fol. 2] American Federation of Labor, and its membership comprises all of the local unions herein joined as parties plaintiff.

2. The plaintiff, Local 2679, Lumber and Sawmill Workers Union, Bovill, Idaho, is a labor organization within the

meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in logging operations.

3. The plaintiff, Local 2664, Lumber and Sawmill Workers Union, Clearwater, Idaho, is a labor organization within the meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in logging operations.

4. The plaintiff, Local 2923, Lumber and Sawmill Workers Union, Coeur d'Alene, Idaho, is a labor organization within the meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in sawmill operations.

5. The plaintiff, Local 2766, Lumber and Sawmill Workers Union, Potlatch, Idaho, is a labor organization within the meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in sawmill operations, and employees of Washington-Idaho-Montana Railroad, a subsidiary railway corporation.

6. The plaintiff, Local 2684, Lumber and Sawmill Workers Union, Lewiston, Idaho, is a labor organization within the meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in sawmill operations.

7. The plaintiff, Harry Haines, is the President of the said plaintiff Inland Empire District Council, and of the plaintiff Local 2766, Lumber and Sawmill Workers Union, residing at Potlatch, Idaho.

8. One of the principal purposes and functions of the said Inland Empire District Council and of the labor unions plaintiffs herein is to represent employees for the purpose of collective bargaining with employers, and to organize workers for their mutual aid and protection. The plaintiffs [fol. 3] herein transact business exclusively within the State of Idaho, and the plaintiff, Harry Haines, resides within the State of Idaho.

9. The National Labor Relations Board, hereinafter called the Board, is an agency of the United States Government created by the National Labor Relations Act, with offices at Washington, in the District of Columbia, and the defendant, Harry A. Millis, is Chairman and a member of said Board and resides in the District of Columbia. The defendants, Gerald D. Reilly and John M. Houston, are members of the Board and reside in the District of Columbia.

10. The said Inland Empire District Council is fairly representative of the local unions comprising its membership, and said local unions herein joined as parties plaintiff are fairly representative of their membership, and the total membership of said local unions is in excess of 4,000. This action is brought in behalf of the labor organizations and persons joined as parties plaintiff on behalf of all members of the said local unions.

11. The sum in controversy between plaintiffs and said defendants exceeds the sum of Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

12. The International Woodworkers of America is an organization affiliated with the Congress of Industrial Organizations, and Locals 10-358, 10-361, and 10-364 are local unions affiliated with said International Woodworkers of America, operating and doing business within the State of Idaho.

13. Potlatch Forests, Inc., is a corporation engaged in lumbering and sawmill operations within the State of Idaho, and has plants and/or camps at Bovill, Headquarters, Coeur d'Alene, Potlatch and Lewiston, in the State of Idaho, and the individual members of the local unions herein joined as parties plaintiff are employees of said Potlatch Forests, Inc. The five plants or operations of the Company are known as the Potlatch Unit Plant, located at Potlatch, Idaho; the Rutledge Unit Plant, located at Coeur d'Alene, Idaho; the Clearwater Unit Plant, located at Lewiston, Idaho; the Bovill Logging Department, located at Bovill, Idaho; and the Clearwater Logging Department, located at Headquarters, Idaho.

14. On the 9th day of March 1943, the said Locals 10-358, 10-361, and 10-364, affiliated with the International Wood- [fol. 4] workers of America and the Congress of Industrial

Organizations, filed with the National Labor Relations Board petitions for investigation and certification as collective bargaining representative in each of three separate operations of the Company, said three separate units to consist of the production and maintenance employees at the Clearwater Unit plant, the Bovill Logging Department, and the Clearwater Logging Department. A hearing was held on said petitions at Lewiston, Idaho, on the 14th day of May 1943, before a Trial Examiner appointed by the Board.

15. At said hearing the petitioning local unions affiliated with the Congress of Industrial Organizations appeared and presented evidence and argument in support of said petitions, and the plaintiffs herein, affiliated with the American Federation of Labor, appeared and presented evidence and argument in opposition to said petitions, and resisted the same upon the principal ground that the three separate units sought by the petitioners were inappropriate.

16. Thereafter, on the 13th day of July 1943, the Board issued its decision and order, including findings of fact, by which it decided that the three separate units composed of three of the five separate operations of the Company were inappropriate for the purposes of collective bargaining, and that no question concerning representation for the purposes of collective bargaining had arisen within an appropriate unit, and therefore dismissed the petitions for certification.

17. Thereafter, on July 16, 1943, the Congress of Industrial Organizations, through its affiliated unions, filed with the Board a new petition requesting certification as a bargaining representative in a new and different unit to be composed of the production and maintenance employees of Potlatch Forests, Inc., at all five of its aforesaid operations, but excluding clerical supervisory, Potlatch Townsite, Potlatch Mercantile Company, confidential and temporary employees, said unit to be a single unit composed of employees of all five operations of the Company.

18. Thereafter, on August 11, 1943, the Congress of Industrial Organizations filed with the Board a motion requesting that the record made pursuant to said dismissed [fol. 5] petitions in Cases numbered R-5373 and R-5374

be reopened and considered as part of the record in support of said new petition in Case numbered 19-R-1164, and that an election be directed among the employes in the proposed new unit composed of all five operations of the Company without the holding of a hearing, or, in the alternative, that the record in Cases numbered R-5373 and R-5374 be incorporated in Case numbered 19-R-1164, and that an election be directed.

19. On September 14, 1943, the Board issued a notice to show cause why (1) the Decision and Order in Cases numbered R-5373 and R-5374 should not be vacated; (2) the petitions in those cases should not be reinstated; (3) the petition in Case numbered R-19-1164 should not be made a part of the record in Cases numbered R-5373 and R-5374 and considered an amendment to the petitions in said cases; (4) the statement of the Field Examiner concerning claims of authorization for the purpose of representation in Case numbered 19-R-1164 should not be made a part of the record in Cases numbered R-5373 and R-5374; and (5) the Board should not reconsider the Decision and Order in Cases numbered R-5373 and R-5374 as thus supplemented and proceed to a new decision without further hearing. Thereafter, the plaintiffs filed with the Board their protest and objections to the proposed action of the Board, on the ground that such action would deprive plaintiffs of an appropriate hearing and opportunity to present evidence, and would in other respects be violative of the right of plaintiffs to a fair hearing on the new issues raised by said new petition in case numbered 19-R-1164, and that such procedure was contrary to law and particularly in violation of Section 9 (c) of the National Labor Relations Act, which is as follows:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or [fol. 6] utilize any other suitable method to ascertain such representatives."

20. On the 14th day of October 1943, the Board, without providing for a hearing on said new petition (Case No. 19-R-1164), over the objection of plaintiff unions, arbitrarily and capriciously issued its decision and direction of election, wherein it vacated its former decision and order of dismissal in consolidated Cases numbered R-5373 and R-5374, reinstated the petitions in those cases, made the new petition in Case numbered 19-R-1164 a part of the record in those cases, treated it as an amendment to the petitions in those cases, made the "Statement of Field Examiner concerning claims of authorization for the purpose of representation" and the "Revised Statement of Field Examiner concerning claims of authorization for the purpose of representation" in said new Case numbered 19-R-1164 a part of the record in those cases, found that a question affecting commerce had arisen concerning the representation of employees of Potlatch Forests, Inc., within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act; that

> "all production and maintenance employees of the Company at its five operations, including scalers, and railroad employees at the logging operations who are not employees of the Washington-Idaho-Montana Railroad, but excluding all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or effectively recommend such action, store employees, armed and militarized guards and watchmen, clerical employees, confidential employees, employees of Potlatch Mercantile Company, employees of the Townsite Department, foresters, and temporary employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act,"

and ordered that the question concerning representation be resolved by an election by secret ballot among the employees in said unit.

[fol. 7] 21. In said decision and direction of election, the Board acted arbitrarily and capriciously in that (a) the Board treated the petition in case numbered 19-R-1164 as an amendment to the petitions in said dismissed Cases numbered R-5373 and R-5374, and proceeded to a decision

and direction of election without a hearing or notice of hearing, notwithstanding that such amendment introduced new and substantially different and inconsistent issues from those involved in the prior hearing held on May 14, 1943, in Cases numbered R-5373 and R-5374; (b) the Board failed and refused to grant a hearing on said new petition, contrary to the provisions of Section 9 (c) of the National Labor Relations Act, and contrary to the provisions of Article III, Section 3, of the Rules and Regulations promulgated by the National Labor Relations Board, which is in part as follows:

> "SEC. 3. If it appears to the Board that an investigation should be instituted it shall so direct and (except as provided in Section 10 of this Article) shall authorize the Regional Director to undertake such investigation and to provide for an appropriate hearing upon due notice, either in conjunction with a proceeding instituted pursuant to Section 5 of Article II of these Rules and Regulations, or otherwise, . . .;"

(c) in that the Board vacated its former decision dismissing such Cases numbered R-5373 and R-5374, and found that a question of representation had arisen without conducting a hearing to determine such question, and determined the appropriate unit and ordered an election in such unit, although no election had been sought in such unit and was not an issue until the filing of the petition in Case numbered 19-R-1164, long after the hearing of May 14, 1943, held in Cases numbered R-5373 and R-5374.

21(a). By treating the new petition filed after the hearing as an amendment, the Board introduced new and different issues upon which no hearing had been afforded as follows:

> (a) Whether a question concerning representation within the meaning of the National Labor Relations Act had arisen in a collective bargaining unit com- [fol. 8] posed of employees in all five plants or operations of the company as described in Paragraph 20 hereof, and whether such question should be resolved by an election. At the hearing the issue was whether such question of representation had arisen in three

separate units composed of employees in only three of said plants or operations.

(b) At the time of the hearing no issue had been raised concerning representation of employees in the Potlatch Unit Plant, or in the Rutledge Unit Plant. In connection with these two plants, classifications of employees were involved which had no counterpart in any other operations of the Company, but the Board assumed to exclude and did arbitrarily exclude those employees from the appropriate unit and from participation in the subsequent election without affording a hearing on such issues prior to the election. Among such employees were: Potlatch Townsite and Potlatch Mercantile Company employees. Further, plaintiffs had no opportunity at the hearing prior to the election to present evidence concerning employees of Washington-Idaho-Montana Railroad and the question of whether they should be permitted to participate in the election and be included in the five-plant unit.

(c) By adopting new issues, plaintiffs were deprived of the right to present evidence and argument in support of its contention that several hundred of its members employed at the Potlatch Unit Plant and the Rutledge Unit Plant, temporarily absent in the military service but with full seniority preserved, should be permitted to vote. These employees absent in military service were not involved in the only hearing held prior to the election.

These and other objections were raised by plaintiffs by their motion to reconsider and vacate the decision and direction of election and to vacate and set aside the election. The denial of a fair and appropriate hearing on such questions was not and could not be cured by the granting and holding of a hearing on February 18 and 19, 1944, which was more than three months after the holding of the election.

[fol. 9] 22. Thereafter, on November 9, 10, 11, and 12, 1943, pursuant to its decision and order of election, the board conducted an election among the employees in said unit under the direction of its Regional Director for the Nineteenth Region who issued his report on ordered elec-

tion, giving among other things the results of said election as follows:

Approximate number of eligible voters, 2,886.

Count of Ballots:

Total ballots cast	2,178
Total ballots challenged	83
Total void ballots	3
Total valid votes counted	2,092
Total votes cast for International Woodworkers of America, C. I. O.	1,118
Total votes cast for Inland Empire District Council, Lumber and Sawmill Workers Union, A. F. L.	953
Total votes cast for Neither	21

The number of ballots cast for the International Woodworkers of America, C. I. O., although a majority of those voting, was substantially less than 50% of those eligible to vote, and the Regional Director recommended that the Board certify the International Woodworkers of America, C. I. O.

23. Thereafter, the plaintiff unions, affiliated with the American Federation of Labor, filed objection to the election and instituted a suit in this Court for injunction to prevent such certification, being Civil Action No. 22,353, which was dismissed on or about the 21st day of December 1943, on the ground that plaintiffs had not exhausted their administrative remedies.

24. Thereafter, the plaintiffs filed with the National Labor Relations Board a motion to reconsider and vacate the decision and direction of election, to vacate the election, stay certification of representatives, and grant an appropriate hearing. Pursuant thereto, the Board, on January 27, 1944, ordered that a hearing be held to adduce evidence with respect to the issues raised by the last said motion and objections to the election, and further ordered that ruling on that portion of plaintiffs' motion, requesting that the decision and direction of election and the election be vacated, be deferred until the Board reconsidered the entire record, including evidence to be adduced at such further hearing.

[fol. 10] 25. In accordance with said order, a hearing was held before a Trial Examiner on February 18th and 19th, 1944, which was participated in by the parties, and on March 4, 1944, the Board rendered a supplemental decision and certification of representatives, in which it denied the said motion of plaintiff unions to vacate said decision and direction of election, and proceeded to certify the C. I. O. as the exclusive representative of the employees in the appropriate unit. On March 8, 1944, plaintiff unions filed a motion with the Board that it reconsider its supplemental decision and certification entered March 4, 1944, which motion has been denied. Said plaintiffs have exhausted their administrative remedies available herein.

26. The Board acted arbitrarily and in violation of law in resolving any question of representation which may have arisen by means of an election held November 9, 10, 11th, and 12, 1943, a time prior to the holding of a full and fair hearing on the issues raised by the petitions as amended, in rendering its supplemental decision and certification of representative on March 4, 1944, based upon the results of such election, and in denying plaintiffs' motion to reconsider and vacate its decision and direction of election and the election. By reason of the failure of the Board to provide an appropriate hearing upon due notice upon the issues as amended, as a condition precedent to the holding of a valid election for the purpose of resolving a question of representation, these plaintiff labor unions and their members were deprived of their right to an appropriate, fair and impartial hearing upon due notice as guaranteed by the National Labor Relations Act, and were deprived of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

27. The Inland Empire District Council and its affiliated local unions, plaintiffs herein, for many years last past have an exclusive collective bargaining cont-act with the Potlatch Forests, Inc., covering the terms and conditions of employment of all the employees involved herein; said contract was originally negotiated between parties thereto, and has been continued in force and effect by orders and directives of the National War Labor Board made May 10, 1943, and January 31, 1944, pursuant to its authority con-
[fol. 11] tained in the War Labor Disputes Act. By said

orders and directives, said contract shall remain in effect until a new exclusive bargaining agency is certified by the National Labor Relations Board, and except for the unlawful acts and certifications of representative by the National Labor Relations Board on March 4, 1944, herein complained of, said contract would continue in full force and effect.

28. The plaintiff labor organizations have existed and functioned for many years, and have accumulated valuable business and property rights which will be lost unless the relief herein sought is granted. The plaintiff labor unions, by reason of said unlawful actions, decisions and certification of representative, will suffer a great loss in membership and revenue, will be unable to represent the employees of Potlatch Forests, Inc., constituting their membership, for purposes of collective bargaining, will be unable to improve the terms and conditions of employment of said employees and to continue to represent them in matters involving back pay and other working conditions before the National War Labor Board. Plaintiffs have invested thousands of dollars in organizational expenses and in establishing local unions, which money and property will be lost. Plaintiffs will lose valuable contract rights existing between them and Potlatch Forests, Inc., will suffer a great loss of prestige and good will among present and future employees of Potlatch Forests, Inc., and by reason of such threatened loss of good will, membership, revenue, contractual rights and status as collective bargaining representative of such employees, are threatened with a termination of all their business activity.

29. Several hundred of the members of plaintiff unions are now in the military service of the United States, and such members have been continued as members in good standing, with all the rights and privileges of membership, and with the right to reinstatement and seniority in employment with said Company upon their return from military service, and such members in the military service, together with all other members of said unions employed by Potlatch Forests, Inc., are threatened with the loss of all their rights relating to employment, reemployment and seniority, as well as wages, working conditions and other benefits, as provided by contract.

[fol. 12] 30. The plaintiffs have no other plain, speedy or adequate remedy at law, and unless the defendants be temporarily and permanently enjoined as herein prayed, plaintiffs and their members will suffer great and irreparable loss, injury and damage.

Wherefore, plaintiffs pray that the Court cause appropriate process to issue against the defendants and each of them, and require the defendants to answer this bill of complaint as provided by the rules of this Court and by law.

Plaintiffs further pray that the defendants and each of them, and their successors in office, and all persons acting or claiming to act under their authority or by their direction be temporarily and permanently enjoined from refusing to vacate and withdraw the said order of certification of International Woodworkers of America, affiliated with the Congress of Industrial Organizations, as exclusive bargaining representative for the employees of Potlatch Forests, Inc., within said unit, and that the defendants be directed and required to withdraw such order of certification.

Plaintiffs further pray, without prejudice to and without waiving the foregoing prayer for relief, and in the alternative, that this Court make and enter herein its declaratory judgment and decree, decreeing and adjudging that said certification of the International Woodworkers of America, affiliated with the Congress of Industrial Organizations, as exclusive bargaining representative for the employees of Potlatch Forests, Inc., in said unit is invalid, in law void, and of no force or effect, for the reasons hereinbefore set forth.

Plaintiffs further pray for such other further and different relief as they may be entitled to receive.

Dated this — day of March, 1944.

Wettrick, Flood & O'Brien, (Sgd.) George E. Flood, 805-810 Arctic Building, Seattle 4, Washington. (Sgd.) Joseph A. Padway, (Sgd.) James A. Glenn, 736 Bowen Building, Washington 5, D. C., Attorneys for Plaintiff.

[fol. 13] *Duly sworn to by Harry Haines. Jurat omitted in printing.*

In United States District Court

Motion to Dismiss Complaint—Filed March 29, 1944

* * * * * * * * *

Now comes the defendants, Harry A. Millis, Gerard D. Reilly, and John M. Houston, individually and as members of the National Labor Relations Board, by their attorneys, and respectfully move the Court to dismiss the complaint herein upon the following grounds:

I. The United States District Court is without jurisdiction over the subject matter of this action. The plaintiffs pray for the issuance of a mandatory injunction requiring the defendants to set aside a certification of representatives made by them in their official capacities as members of the National Labor Relations Board and, in the alternative, for the entry of a declaratory judgment decreeing said certification invalid and void. In praying for such relief plaintiffs are in effect seeking a [fol. 14] review of said certification. The Act, however, does not provide for a review of Board proceedings concerning the investigation and certification of collective bargaining representatives until such time as the Board enters a final order based in whole or in part upon facts certified in such proceeding. It is for Congress to determine how the rights which it creates shall be remedied. The intent of Congress, as expressed in the Act and in the reports and debates on the bill which became the Act, clearly indicate that there was to be no judicial review except as set forth above. The District Court is therefore without jurisdiction to grant the relief sought by the complaint.

II. Even assuming that the Court has jurisdiction of the subject matter of this action, plaintiffs have failed in their complaint to make out a cause of action entitling them to the relief prayed for.

A. The complaint on its face fails to show that plaintiffs are threatened with or in any danger of suffering any great, irreparable, or immediate injury, or any injury cognizable in equity as a result of any action by the defendants.

1. The alleged injury or threatened injury of which plaintiffs complain is a consequence not of the Board's

certification of the International Woodworkers of America, which plaintiffs seek to have the Court set aside, but of the obedience of Potlatch Forests, Inc., to the command of the statute to bargain collectively with the representative of a majority of its employees in an appropriate bargaining unit. The certification is not an order but merely a statement of the Board's findings in a wholly investigatory proceeding. The certification does not command plaintiffs or anyone else to do or to refrain from doing anything. Not until after the Board has entered a bargaining order can plaintiffs be injured by any action of the defendants. Such an order can be entered only after a further proceeding under Section 10 (c) of the Act in which plaintiffs may, upon a proper showing of interest, intervene and contest the validity of any prior certification relied on by any of the parties. Should plaintiffs deem themselves aggrieved by a bargaining order entered pursuant to Section 10 (c) of the Act, they may petition an appropriate circuit court of appeals of the United States to review and set aside such order, pursuant [fol. 15] to Section 10 (f) of the Act. In said proceedings the validity of the certification would be reviewable by the circuit court of appeals, as provided in Section 9 (d) of the Act. Thus the procedure for administrative hearing and court review proscribed in the Act affords plaintiffs adequate safeguards against any unwarranted action on the part of the defendants capable of injuring plaintiffs.

B. The complaint fails to allege facts warranting the issuance of a mandatory injunction. Such an injunction is governed by the same principles as a writ of mandamus, and such relief will be granted only when the duty to act is clear and substantially ministerial. It will not be used to require repudiation of a decision reached in the exercise of judgment and discretion pursuant to valid authority.

C. The complaint fails to show any "actual controversy" within the meaning of the Federal Declaratory Judgments Act (48 Stat. 995, 28 U. S. C. A., Section 400), which would warrant the exercise of jurisdiction by this Court to declare rights as plaintiffs request it to do.

III. Even assuming that the Court has jurisdiction in this matter and that the plaintiffs otherwise have made out

a cause of action entitling them to the relief prayed for, such relief could not be granted without adversely affecting the rights of International Woodworkers of America, affiliated with the C. I. O., the union certified by the Board in the certification complained of. Plaintiffs' failure to join as a party and to secure service upon this indispensable party requires the dismissal of the complaint.

Respectfully submitted. (S) Alvin J. Rockwell, General Counsel. (S) Malcolm F. Halliday, Associate General Counsel. (S) Charles F. McErlean, (S) Owsley Vose, Attorneys for defendants.

Dated: March 29, 1944.

[fol. 16] In United States District Court

* * * * * * * *

Appearances: George E. Flood, Esq., Joseph A. Padway, Esq., and James A. Glenn, Esq., appearing for the Plaintiffs. M. F. Halliday, Esq., and Charles F. McErlean, Esq., appearing for the defendants.

Decision of the Court—Filed April 5, 1944

(Following the arguments of counsel:)

The Court. It is not necessary for the Court to take the matter under advisement. The Court is perfectly clear as to what the Court should do.

Of course, when this case comes before the Court for hearing it may appear the objections of the claimant here are trivial. The Court may find that when the hearing was held after the election that the hearing showed that everyone was allowed to vote at the election that would have been allowed to vote if a hearing had been held on the second petition, or it may hold that all the important factors involved are exactly what they would have been if the second hearing had been held.

The Court, in ruling as it is about to rule, is not, in any way, in any manner, or to any extent, of course, passing upon the merits of the controversy, but here is a situation where according to the complaint, and the complaint

states the facts in so far as the particular hearing is concerned—here is a case where the Board did not comply with the provisions of the Act in a very important particular, and the Court is asked to say by this motion that there is no way that the party who has been treated not in accordance with the law can obtain any relief from any source.

Now, the American Doctrine of Judicial Supremacy, of course, was declared by the Supreme Court at a very early date. It has never been challenged since. On the other hand, it is apparently gaining momentum. The Court realizes that that doctrine was used for over 100 years by the Supreme Court in the maintenance of property rights, and in almost—very largely I will say—in [fol. 17] disregard of the rights of the everyday individual.

Now, while, happily, that has not been the condition for several years past, while the Court now understands that the benefit of each class is furthered by justice to every class, the Supreme Court has not, in any manner, or to any extent, undertaken to modify the American Doctrine of Judicial Supremacy.

Now, under the American system, if the United States District Court hasn't any jurisdiction to grant relief in this case, then there is no relief that can be granted. You can't get relief anywhere. The Court has no doubt of its power and duty to entertain this complaint, and, of course, the Court wants to emphasize the fact, which is so often misunderstood, that the Court doesn't in any manner, or to any extent, undertake to pass on the merits, but the motion to dismiss, gentlemen, will have to be overruled.

(Thereupon, after further discussion as to time of filing the order, the hearing was, at 11:30 o'clock A. M., adjourned.)

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS COMPLAINT—Filed April 5, 1944

* * * * * * *

Upon consideration of the Motion to Dismiss the Complaint, filed herein, and after oral argument upon the same, it is, by the Court, this 5th day of April 1944

Ordered, That the Motion to Dismiss the Complaint be, and the same is, hereby overruled in accordance with the oral Memorandum Opinion of the Court delivered on April 4th, 1944, with the right in the said defendants to answer said Complaint on or before the 22d day of May 1944.

(Sgd.) T. Alan Goldsborough, Justice.

Approved as to form:

(Sgd.) George E. Flood, (Sgd.) James A. Glenn, Attorneys for Plaintiffs. —— ——, Attorneys for Defendants.

[fol. 18] IN UNITED STATES DISTRICT COURT

NOTICE OF INTENTION TO APPLY FOR ALLOWANCE OF SPECIAL APPEAL—Filed April 5, 1944

* * * * * * * *

Notice is hereby given this 5th day of April, 1944, that Harry A. Millis, Gerard D. Reilly, and John M. Houston, individually and as Members of the National Labor Relations Board, defendants, intend to apply for allowance of a special appeal to the United States Court of Appeals for the District of Columbia from the Order of this Court entered on the 5th day of April, 1944, in favor of the above-named plaintiffs and against said defendants.

Alvin J. Rockwell, General Counsel; Malcolm F. Halliday, Associate General Counsel; Charles F. McErlean, Owsley Vose, Attorneys for defendants, 815 Connecticut Ave., N. W., Washington, D. C.

[fol. 19] In United States Court of Appeals for the District of Columbia, April Term, 1944

No. 8746

No. 23,547 Civil, District Court

Harry A. Millis, Individually and as Chairman and Member of the National Labor Relations Board, et al., Petitioners,

v.

Inland Empire District Council, Lumber and Sawmill Workers Union, et al., Respondents

Before Groner, C. J., and Miller and Edgerton, JJ.

Order Allowing Special Appeal, etc.—Filed May 16, 1944.

On consideration of petition for allowance of special appeal and the answer thereto filed in the above-entitled case, it is

Ordered by the court that a special appeal from the order of Mr. Justice Goldsborough entered on April 5, 1944, in the District Court in this cause be, and it is hereby, allowed. The application to reverse is denied, without prejudice, and the appeal set for argument on June 13, 1944.

Dated May 15, 1944.

A true Copy,

Test: (S.) Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 20] Filed May 16, 1944. Charles E. Stewart, Clerk.

In United States District Court

[Title omitted]

Joint Designation of Record on Appeal

The appellants and appellees jointly designate the following as the record on special appeal herein:

1. The Complaint.

2. The Motion to Dismiss.

3. Order of April 5, 1944, Denying the Motion to Dismiss.
4. Transcript of Oral Opinion of Justice Goldsborough.
5. Notice of Intention to Apply for Special Appeal.
6. Order Allowing Special Appeal.
7. This Designation of Record.
8. Clerk's Certificate.

(S.) Joseph A. Padway, (S.) James A. Glenn, Attorneys for Plaintiffs (Appellees).

(S.) Alvin J. Rockwell, General Counsel, (S.) Malcolm F. Halliday, Associate General Counsel, (S.) Charles F. McErlean, Attorney, Attorneys for Defendants (Appellants).

Dated this 16th day of May 1944.

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 21a] [Stamp:] United States Court of Appeals for the District of Columbia. Filed May 19, 1944. Joseph W. Stewart, Clerk.

[fol. 22] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

* * * * * * * *

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Justin Miller, and Henry W. Edgerton, Associate Justices.

* * * * * * * *

No. 8716

HARRY A. MILLIS, Individually &c., et al., Appellants,

vs.

INLAND EMPIRE DISTRICT COUNCIL &c., et al., Appellees

MINUTE ENTRY—June 13, 1944

On motion of Mr. Joseph A. Padway, Mr. George E. Flood, a member of the Bar of the Supreme Court of Washington, was permitted to argue for appellee Inland Empire District Council, pro hac vice by special leave of Court.

Argument commenced by Mr. Charles F. McErlean, attorney for appellants, continued by Messrs. George E. Flood and Joseph A. Padway, attorneys for appellees, and concluded by Mr. Charles F. McErlean, attorney for appellants.

. . . . . .

[fol. 23] IN UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8746

HARRY A. MILLIS, Individually and as Chairman and Member of the National Labor Relations Board, et al., Appellants,

v

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, et al., Appellees

Special Appeal from the District Court of the United States for the District of Columbia

Argued June 13, 1944.—Decided July 24, 1944

Mr. Charles F. McErlean, National Labor Relations Board, with whom Messrs. Alvin J. Rockwell, General Counsel, and Malcolm F. Halliday, Associate General Counsel, both of the National Labor Relations Board, were on the brief, for appellants.

Mr. George E. Flood, member of the Bar of the Supreme Court of the State of Washington, pro hac vice, by special leave of Court, with whom Messrs. Joseph A. Padway and James A. Glenn were on the brief, for appellees.

Before Groner, C. J., and Miller and Edgerton, JJ.

OPINION—Filed July 24, 1944

EDGERTON, J.:

Appellee unions ask a mandatory injunction requiring appellants, the members of the National Labor Relations Board, to set aside a certification, following an election, of the collective bargaining representatives of certain em-

ployees of Potlatch Forests, Inc., a large logging and lumbering concern in Idaho. The complaint also asks for a declaratory judgment that the certification is void. It attacks the sufficiency of the hearings which the Board held in connection with the election. It states that the employer has bargained with appellee unions in the past and will be deterred by the Board's certificate from doing so in the future, and asserts that this will cause irreparable injury to appellees. The District Court declined to dismiss the complaint on appellants' motion. We think this was error. [fol. 24] The National Labor Relations Act authorizes judicial review of the Board's certification if, but only if, the Board finds unfair labor practices and makes its certification the basis of an order with respect to such practices. §§ 9 (d), 10 (c); 49 Stat. 453, 454; 29 U. S. C. §§ 159 (d) 160 (c). There is no such finding or order in this case. We think the statutory review is exclusive. In *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 412, the Supreme Court expressly reserved the question whether the Board's mere certification of collective bargaining representatives could be reviewed in a suit like the present one. But we think the question is now foreclosed by *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, which held that the District Court had no power to review a similar certification of the National Mediation Board. *Reilly* v. *Millis*, — U. S. App. D. C. — (No. 8657, decided July 10, 1944); *Cf. Employers Group of Motor Freight Carriers, Inc.* v. *National War Labor Board*, — U. S. App. D. C. — (No. 8680, decided June 2, 1944).

Reversed.

Dissenting Opinion

Groner, C. J. dissenting:

The controversy here primarily concerns the employees of Potlatch Forests, Inc. That corporation is engaged in lumbering and sawmill operations in Idaho. It owns five plants, located miles apart, one at Lewiston, one at Coeur d'Alene, one at Potlatch, one at Boville and the other at Headquarters. Five labor unions, locals of the American Federation of Labor, had for years represented, respectively, the employees of these five operations.

In March, 1943, locals of the C. I. O. filed with the Labor Board petitions to be certified as the bargaining representa-

tive in three of the company's five plants. There was a hearing and the Board in July, 1943, found the units included inappropriate for collective bargaining and dismissed the petitions. A few days after dismissal the C. I. O. unions filed a new petition, requesting certification of the employees of all five operations in a single unit, and a month later followed this with a motion requesting that their petition be treated as an amendment to the former petitions, and that an order directing the holding of an election be entered by the Board. The Board, thereupon, without providing a hearing, and over the objection of the A. F. of L. unions, issued an order directing the holding of a general election. Accordingly an election was held, in which all present employees of all five plants, except certain excepted employees, voted, or might have voted, with the result that the C. I. O. secured the majority of those voting, which, it is claimed, however, was less than fifty per cent of those eligible to vote.

The complaint here alleges that—

"In said decision and direction of election, the Board acted arbitrarily and capriciously in that (a) the Board treated the petition in case numbered 19-R-1164 as an amendment [fol. 25] to the petitions in said dismissed Cases numbered R-5373 and R-5374, and proceeded to a decision and direction of election without a hearing or notice of hearing, notwithstanding that such amendment introduced new and substantially different and inconsistent issues from those involved in the prior hearing held on May 14, 1943, in Cases numbered R-5373 and R-5374; (b) the Board failed and refused to grant a hearing on said new petition, contrary to the provisions of Section 9 (c) of the National Labor Relations Act, and contrary to the provisions of Article III, Section 3 of the Rules and Regulations promulgated by the National Labor Relations Board, * * *."

Various other grounds are alleged tending to show capricious and arbitrary action on the part of the Board in the exclusion of certain classes of employees from the right to vote and in depriving of their votes several hundred temporary absentees in the military services, who, though absent for the time being, had retained full seniority rights.

The majority of this court now hold that the Labor Act does not authorize judicial review of the Board's certifica-

tion where the Board has not followed its certification with an order, and hence that since here there was no order, the decision of the District Court sustaining its jurisdiction was wrong. The effect of this is, as it appears to me, to recognize a right on the part of the Board, when it likes and as it likes, by withholding its order, to determine the right of judicial review,—a position which I think is wholly wrong and untenable and neither more nor less than a usurpation of power.

I am by no means unmindful of the extent to which the Supreme Court has gone in denying review in cases under the Railway Labor Act,[1] but I am by no means persuaded that because of this the Supreme Court will, when properly confronted, go equally as far in its interpretation of the Wagner Act. At least in the one case in which the question arose the Court expressly reserved consideration (308 U. S. 401, 412).

Here, as I have pointed out, appellees claim irreparable injury and a lack of due process as a consequence of the certification without a hearing. What support there is of this in the facts I have no means of knowing, but I think it is not an answer to the contention to say that Congress has denied to the courts of the country the right to examine and determine the validity of the charge; or, indeed, that Congress, constitutionally, may do so. It is quite true that, in cases under the Railway Labor Act, the Court speaks of the "right" of an employee to choose his representative as a right created by Congress and, therefore, as a right which Congress having given, Congress may take away; and it may be that the same answer is appli- [fol. 26] cable here, but I prefer that it should be declared by the Supreme Court rather than by this court. For I had always thought that the right of a man to labor and to enjoy the fruits of his labor was an inherent right—a natural prerogative,—which did not arise out of the concession of any State. I had considered it the foundation of all rights where liberty is recognized, and as a species

[1] Witness, for instance, *Brotherhood of Clerks*, etc. v. *United Employees*, 320 U. S. 715 (137 F. (2d) 817), where the effect of the rule was to force 45 negro station porters, against their protest, to accept representation by a white man's union from which they were excluded.

of property which no law can restrict, save in those socialistic states where individual rights and liberties are unknown. If all of this be true, as I had thought was universally recognized, then—representation—the right to combine one's faculties with those of others and to profit by the combination—is just as incontestable and imprescriptible.

I am, therefore, unwilling to agree that this "right" and its concomitants are subject to the power of Congress or courts to grant or withhold. I think the District Court was correct in asserting jurisdiction.

[fol. 27] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

JUDGMENT—Filed July 24, 1944

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to said District Court with directions to dismiss the complaint.

Per Mr. Justice Edgerton.

Dated July 24, 1944.

Dissenting opinion by Mr. Chief Justice Groner.

[fol. 28] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed Sept. 16, 1944

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellant's brief. (Appendix to Petition for Allowance of Special Appeal—pages 16 to 32, inclusive.)
2. Order allowing special appeal.
3. Minute entry of argument.
4. Opinions.
5. Judgment.
6. This designation.
7. Clerk's certificate.

(Signed) George E. Flood, 805 Arctic Building, Seattle, Washington; (Signed) Joseph A. Padway; (Signed) James A. Glenn, 736 Bowen Building, Washington, D. C., Counsel for Appellees.

Acknowledgment of Service

The undersigned hereby acknowledge service of a copy of the foregoing Designation of Record upon appellants this 13th day of September, 1944.

Charles F. McErlean, Counsel for Appellants.

[fol. 29] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 30] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1944.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.